02-24-06

HEWLETT-PACKARD COMPANY
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PATENT APPLICATION

ATTORNEY DOCKET NO. __10005002-1__

IN THE
UNITED STATES PATENT AND TRADEMARK OFFICE

Inventor(s):	Curtis C. Ballard	Confirmation No.: 2123
Application No.:	10/007,116	Examiner: D. E. England
Filing Date:	11-07-2001	Group Art Unit: 2143

Title: SYSTEM AND METHOD OF AUTOMATED DEVICE DATA COLLECTION

Mail Stop Appeal Brief-Patents
Commissioner For Patents
PO Box 1450
Alexandria, VA 22313-1450

TRANSMITTAL OF APPEAL BRIEF

Transmitted herewith is the Appeal Brief in this application with respect to the Notice of Appeal filed on ____12-29-2005____.

The fee for filing this Appeal Brief is (37 CFR 1.17(c)) $500.00.

(complete (a) or (b) as applicable)

The proceedings herein are for a patent application and the provisions of 37 CFR 1.136(a) apply.

☐ (a) Applicant petitions for an extension of time under 37 CFR 1.136 (fees: 37 CFR 1.17(a)-(d)) for the total number of months checked below:

☐ 1st Month $120	☐ 2nd Month $450	☐ 3rd Month $1020	☐ 4th Month $1590

☐ The extension fee has already been filed in this application.

☒ (b) Applicant believes that no extension of time is required. However, this conditional petition is being made to provide for the possibility that applicant has inadvertently overlooked the need for a petition and fee for extension of time.

Please charge to Deposit Account 08-2025 the sum of ___$ 500___. At any time during the pendency of this application, please charge any fees required or credit any over payment to Deposit Account 08-2025 pursuant to 37 CFR 1.25. Additionally please charge any fees to Deposit Account 08-2025 under 37 CFR 1.16 through 1.21 inclusive, and any other sections in Title 37 of the Code of Federal Regulations that may regulate fees. A duplicate copy of this sheet is enclosed.

Respectfully submitted,

Curtis C. Ballard

By_____

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(X) I hereby certify that this correspondence is being deposited with the U.S. Postal Service as Express Mail, Airbill No. EV568265937US, in an envelope addressed to: MS Appeal Brief-Patents, Commissioner for Patents, PO Box 1450, Alexandria, VA 22313-1450
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Rev 10/05 (AplBrief)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
Curtis C. Ballard

Application No.: 10/007,116	Confirmation No.: 2123
Filed: November 7, 2001	Art Unit: 2143
For: SYSTEM FOR AND METHOD OF AUTOMATED DEVICE DATA COLLECTION	Examiner: D. E. England

APPEAL BRIEF

MS Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

As required under § 41.37(a), this brief is filed within two months of the Notice of Appeal filed in this case on December 29, 2005, and is in furtherance of said Notice of Appeal.

The fees required under § 41.20(b)(2) are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

This brief contains items under the following headings as required by 37 C.F.R. § 41.37 and M.P.E.P. § 1206:

I.	Real Party In Interest
II	Related Appeals and Interferences
III.	Status of Claims
IV.	Status of Amendments
V.	Summary of Claimed Subject Matter
VI.	Grounds of Rejection to be Reviewed on Appeal

I.   REAL PARTY IN INTEREST

The real party in interest for this appeal is:

Hewlett-Packard Development Company, L.P., a Limited Partnership established under the laws of the State of Texas and having a principal place of business at 20555 S.H. 249, Houston, TX 77070, U.S.A. (hereinafter "HPDC"). HPDC is a Texas limited partnership and is a wholly-owned affiliate of Hewlett-Packard Company, a Delaware Corporation, headquartered in Palo Alto, CA. The general or managing partner of HPDC is HPQ Holdings, LLC.

II.   RELATED APPEALS, INTERFERENCES, AND JUDICIAL PROCEEDINGS

There are no other appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

III.   STATUS OF CLAIMS

A.   Total Number of Claims in Application

There are 22 claims pending in application.

B.   Current Status of Claims

Claims canceled: 1, 13, 21

Claims withdrawn from consideration but not canceled: 23-25

Claims pending: 2-12, 14-20, and 22-25

Claims allowed: 0

Claims rejected: 2–12, 14–20, and 22

C.   Claims On Appeal

The claims on appeal are claims 2–12, 14–20, and 22

IV.   STATUS OF AMENDMENTS

The Appellant filed an Amendment on April 26, 2005. In the Final Action, dated August 11, 2005, the Examiner indicated that Appellant's amendments were entered.

Accordingly, the claims enclosed herein as Appendix A incorporate the amendments indicated in the paper filed.

V.   SUMMARY OF CLAIMED SUBJECT MATTER

The subject matter of the invention as described by claim 12, incorporates a method of performance monitoring that includes the steps of collecting information (201 of Figure 2 and paragraph 16 of the specification) from a networked device (101 of Figure 1 and paragraph 10 of the specification) pertaining to an ability of said networked device to perform a function, receiving (202 of Figure 2 and paragraph 16 of the specification) a trigger event related to said device's ability to perform said function, organizing (205 of Figure 2 and paragraph 16 of the specification) at least a portion of said collected information into a message, transmitting (203 of Figure 2 and paragraph 16 of the specification) said message to a server (107 of Figure 1 and paragraph 11 of the specification) in response to receiving said trigger event, and automatically analyzing (207 of Figure 2 and paragraph 16 of the specification) said message to determine an appropriate modification of said networked device.

The subject matter of the invention as described by claim 22, incorporates a data collection and transmittal system that includes a networked device (101 of Figure 1 and paragraph 10 of the specification), connected to a digital network (103 of Figure 1 and paragraph 10 of the specification), performing a dedicated stand-alone function, data collection logic (101 and 102 of Figure 1, and paragraph 10 of the specification) configured to collect information pertaining to said networked device's ability to perform said standalone

function, message generation logic (101 and 103 of Figure 1 and paragraph 11 of the specification) configured to recognize a trigger event, associated with networked device's ability to perform said standalone function, and configured to generate an electronic message containing at least a portion of said collected information, and a remote server (107 of Figure 1 and paragraph 11 of the specification) configured to receive said electronic message over said digital networked and to determine an action to be taken with respect to said networked device.

The subject matter of the invention as described by claim 23 employs a consumer appliance (301 of Figure 3 and paragraph 12 of the specification) configured to perform a dedicated standalone function at a consumer location that includes a network card (307 of Figure 3 and paragraph 12 of the specification), capable of communicating with a remote server (303 of Figure 3 and paragraph 12 of the specification)over a network (103 of Figure 1 and paragraph 10 of the specification), appliance performance logic (102 of Figure 3 and paragraphs 10 and 12 of the specification), communicatively coupled to said network card, and capable of communicating a malfunction of said appliance to a remote server (303 of Figure 3 and paragraph 12 of the specification); and appliance repair logic (305, 306, and 102 of Figure 3 and paragraph 12 of the specification) communicatively coupled with said network card and capable of implementing a repair action in response to instructions received from said remote server.

VI.   GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

    A.   **Claims 2, 3, 5, 6, and 22 stand rejected under 35 U.S.C. § 102(e).**

    B.   **Claims 4, 7–12, and 14–20 stand rejected under 35 U.S.C. § 103(a).**

VII.   ARGUMENT

In the Office Action dated January 26, 2005 (hereinafter "First Action"), the Examiner rejected the originally filed claims 1–7, 10, and 12–21 as anticipated by Reichman, U.S. Patent No. 6,738,813 (hereinafter *Reichman*), and rejected claims 8, 9, and 11 as

obvious in light of combinations of *Reichman*, Oskay et al., U.S. Patent No. 5,642,337 (hereinafter *Oskay*), and Moberg et al., U.S. Patent No. 6,738,826 (hereinafter *Moberg*). In the Response dated April 26, 2005 (hereinafter "First Response") the Appellant demonstrated that the present invention was patentable over the cited art by, in part, amending claim 12 to more clearly describe the invention and replacing independent claim 1 with the more clearly worded claim 22.

In the Office Action dated August 11, 2005 (hereinafter "Final Action"), the Examiner accepted that the claims were patentable over *Reichman*, but rejected claims 2, 3, 5, 6, and 22 as anticipated by Conrad, U.S. Patent No. 6,892,236 (hereinafter *Conrad*), making this new rejection final, and by rejecting claims 4, 7–12, and 14–20 over combinations of *Conrad*, *Reichman*, *Moberg*, and *Oskey*. In the Response dated October 11, 2005 (hereinafter "Response to Final"), the Appellant pointed out, specifically, how each of the rejected claims was patentable over the references cited.

However, an Advisory Action dated December 1, 2005 (hereinafter "Advisory"), dismissed the Appellant's arguments, that the Appellant's arguments were mere "allegation[s] that the claims define a patentable invention without specifically pointing out how the language of the claim patentably distinguishes them from the references." *See* Advisory at 2. The Appellant respectfully points out, however, that its Response to Final clearly laid out: 1) the exact claim limitations missing from the cited references; 2) exactly how those missing limitations make the rejected claims patentable; 3) the specific elements of an obviousness rejection the Examiner failed to establish; and 4) exactly how the Examiner's failures, with respect to those obviousness rejections, left the claims un-rejected.

Despite these arguments, the Examiner continues to contend that claims 2, 3, 5, 6, and 22 are anticipated, that claims 4, 7–12, and 14–20 are obvious, and that claims 23–25 should be restricted. The Appellant respectfully points out that each of the Examiner's contention are demonstrably incorrect, and respectfully asks this Board to overturn the rejections.

A.   Claims 2, 3, 5, 6, and 22 stand rejected under 35 U.S.C. § 102(e)

As was clearly demonstrated in the Appellant's Response to Final, *Conrad* does not anticipate claims 2, 3, 5, 6, and 22. It is well settled that, to be anticipatory, a reference must

teach each and every limitation of the rejected claims, *See e.g.* Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628 (Fed. Cir. 1987), and each of the claims 2, 3, 5, 6, and 22 recite limitations that *Conrad* does not teach.

When rejecting claim 22, the Examiner points to *Conrad* column 5 line 49 – column 6 line 23 and appears to believe that the descriptions found at this citation meet all of the features of claim 22. *See* Final Action at 4. Unfortunately, the exact nature of the Examiner's argument is unclear, as neither the Final Action nor the Advisory actually explain what aspects of *Conrad* the Examiner is using to meet the elements of claim 22. Instead, the Examiner has merely quoted the claim's language and made vague assertions that the elements described are found in the cited portions of *Conrad*. Contrary to the Examiner's contentions, however, a review of *Conrad* fails to locate limitations required by claim 22. As discussed in the Appellant's Response to Final, the cited portion of *Conrad* describes a hierarchy of network clients that report on the performance of computer-system components. The ambiguity of the Examiner's rejection makes it impossible to determine which aspect of *Conrad* the Examiner believes matches the "networked device" recited in claim 22, but the wording of the Examiner's rejection seems to imply that the Examiner intends to use either *Conrad's* "computer system components" or *Conrad's* "reporting clients." Despite the M.P.E.P.'s clear admonition that the burden is on the Examiner, not the Appellant, to articulate the elements of a rejection, the Appellant has argued both possibilities in an effort to further prosecution.

As clearly demonstrated in the Response to Final, neither the "computer system components" nor the "reporting devices" described by *Conrad* meet the limitations claim 22 places on "network device[s]." For example, if the Examiner intends the computer-system components to be considered a "networked device[s]" of claim 22, then the Examiner's rejection fails because computer-system components do not perform dedicated, stand-alone functions. If, on the other hand, the Examiner intends *Conrad's* "reporting clients" be "networked device[s]," then the Examiner's rejection fails because *Conrad* cannot have "data collection logic configured to collect information pertaining to said networked device's ability to perform said standalone function," as no aspect of *Conrad* reports on the performance of the "reporting clients." Therefore, *Conrad* fails to teach each and every

limitation of claim 22, and the Appellant respectfully asks this Board to overturn the Examiner's rejection.

Claims 2, 3, 5, and 6 all depend from claim 22 and thus inherit that claim's limitations. While each of claims 2, 3, 5, and 6 recite limitations that make it patentable in its own right, each is at least patentable for depending from a patentable base claim. Therefore, the Appellant respectfully asks this Board to overturn the rejection of claims 2, 3, 5, and 6 as well.

B.   Claims 4, 7–12, and 14–20 stand rejected under 35 U.S.C. § 103(a).

Claims 4, and 7–12, and 14–20 stand rejected as obvious in light of various combinations of references. As with the Examiner's anticipation rejection, however, each of the Examiner's contentions regarding the obviousness rejections are demonstrably incorrect, and the Appellant respectfully asks this Board to overturn these rejections.

1.   The Combination of *Conrad* and *Reichman*

Claims 4, 7, and 10 are rejected as obvious in view of a combination of *Conrad* and *Reichman*, the reference originally cited as anticipatory. However, it is also well settled that, in order to establish a prima facie case of obviousness, a cited combination must, among other things, teach or suggest each and every limitation of a rejected claim. *See e.g.* In re Vaeck, 947 F.2d 488 (Fed. Cir. 1991). Without conceding that the Examiner's rejection establishes the other criteria for establishing a prima facie case of obviousness, the Appellant respectfully submits that the proposed combination of *Conrad* and *Reichman* does not teach or suggest all the limitations of the claims rejected.

Each of claims 4, 7, and 10 depend from claim 22, and, thus, inherit all of that claims limitations. As demonstrated above, *Conrad* does not teach or suggest "a networked device, connected to a digital network, performing a dedicated stand-alone function" and "data collection logic configured to collect information pertaining to said networked device's ability to perform said standalone function." Further, the Appellant demonstrated, and the Examiner agreed, that the Appellant's First Response clearly demonstrated that *Reichman* did not teach or suggest these limitations either. Therefore, the combination of *Conrad* and *Reichman* does not teach or suggest all of the limitations of claims 4, 7, and 10, and the

Examiner has failed to establish a prima facie case for rejecting these claims. The Appellant, therefore, respectfully asks this Board to overturn the Examiner's rejection of claims 4, 7, and 10.

2.   The Combination of *Conrad* and *Moberg*

Claims 12, 14, 15, and 20 stand rejected as obvious in view of *Conrad* and *Moberg*. However, in order to establish a prima facie case of obviousness, an Examiner is required to establish three criteria. First, the Examiner must find a reasonable motivation for combining the proposed references in either the references themselves, or in the information available to one of ordinary skill in the art. Second, the proposed combination must have had a reasonable likelihood of success. Third, the proposed combination must teach or suggest each and every limitation. Without conceding the second criteria, the Appellant respectfully asserts that the Examiner's rejection does not satisfy either the first or third criteria.

The Examiner has failed to provide any motivation for combining features of *Conrad* and *Moberg* for the purposes of rejecting clam 12. Instead, the Examiner merely refers to the motivation provided for claim 11. The Appellant respectfully asserts that this is inadequate as the features of claim 11 are different from those of claim 12, and that this omission alone is enough to demonstrate that the Examiner's rejection fails to establish a prima facie case.

However, the Appellant further asserts that no motivation could be found to make the proposed combination used to reject claim 12. *Conrad* describes a hierarchy of component-performance reporting devices. No reason or need is given in *Conrad* for analyzing messages to determine an appropriate modification to any device monitored by *Conrad*, nor is any structure or programming described that would be capable of performing this function. Yet the Examiner appears to contend that it would be obvious to modify *Conrad* to perform this function, simply because *Moberg*, ostensibly, describes the ability to reprogram network routers. This logic is flawed in at least two respects.

First, *Conrad* and *Moberg* describe completely different systems, and one would need to substantially modify *Conrad* in order to perform any function from *Moberg*. The Examiner cannot establish a prima facie case based on a proposed addition to *Conrad*

requiring substantial unspecified alterations, particularly when the Examiner provides no statement to why one would want to add that functionality.

Second, the feature the Examiner appears to want to add to *Conrad* is not actually performed by *Moberg*. Claim 12 recites "automatically analyzing said message to determine an appropriate modification of said networked device." According to the Examiner, *Conrad* provides messages and analyzes them, and *Moberg* updates routers with replacement software. Neither *Moberg* nor *Conrad*, however, analyze messages to determine an appropriate modification. Without conceding that such a combination could meet the limitations of claim 12, in order to add the updating feature of *Moberg* to *Conrad*, as the Examiner appears to suggest, one must first find someway to determine what must be uploaded. Neither *Conrad* nor *Moberg* suggest how to do so.

Therefore, no motivation exists for combining *Conrad* with *Moberg,* and even if one could be found, the combination would not teach or suggest all of the limitation of the rejected claim. Thus, the Examiner has failed to establish a prima facie case for rejecting claim 12, and the Appellant respectfully asks this Board to overturn the Examiner's rejection.

Claims 14, 15, and 20 depend from claim 12, and this inherit all of that claim's limitation. Although each recites limitations that make it patentable in its own right, each is at least patentable for depending from a patentable base claim. Therefore, the Appellant respectfully asks this Board to overturn the Examiner's rejection of clams 14, 15, and 20 as well.

> 3.   The Combination of *Conrad, Reichman,* and *Oskay*

Claims 8 and 9 stand rejected as obvious in view of *Conrad, Reichman,* and *Oskay*. However, both claims 8 and 9 depend from claim 22, and, thus, inherit all of that claim's limitations. As demonstrated above, *Conrad* does not teach or suggest "a networked device, connected to a digital network, performing a dedicated stand-alone function" and "data collection logic configured to collect information pertaining to said networked device's ability to perform said standalone function." Although not relied on to do so in the Final Action, the Appellant demonstrated, and the Examiner agreed, that neither *Reichman* nor *Oskay* teaches or suggests these limitations in the First Response. Therefore, the combination

of *Conrad, Reichman,* and *Oskay* do not teach or suggest all of the limitations of claims 8 or 9, and the Examiner has failed to establish a prima facie case for rejecting these claims. The Appellant respectfully asks this Board to overturn the Examiner's rejection of claims 8 and 9.

4.   The Combination of *Conrad, Reichman,* and *Moberg*

Claims 11 and 16–19 are rejected as obvious in view of *Conrad, Reichman,* and *Moberg.* However, claim 11 depends from claim 22, and, thus, inherit all of that claim's limitations. As demonstrated above, *Conrad* does not teach or suggest "a networked device, connected to a digital network, performing a dedicated stand-alone function" and "data collection logic configured to collect information pertaining to said networked device's ability to perform said standalone function." Although not relied on to do so in the Final Action, the Appellant demonstrated in its First Response, and the Examiner agreed, that *Reichman* did not teach these limitations either; nor can *Moberg* be used to cure this defect, as *Moberg* describes updating routers, not devices performing a stand-alone function. Therefore, the combination of *Conrad, Reichman,* and *Moberg* do not teach or suggest all of the limitations of claim 11, and the Examiner has failed to establish a prima facie case. The Appellant respectfully asks this Board to overturn the Examiner's rejection of claim 11.

Claims 16–19 depend from claim 12, and, thus, inherit all of that claim's limitations. As demonstrated above, the combination of *Conrad* and *Moberg* lack motivation with respect to the features of claim 12, and also fail to teach or suggest all the features the Final Action appears to want to combine. Although not relied on to do so in the Final Action, the Appellant respectfully asserts that *Reichman* neither provides the missing motivation nor provides the missing limitations. Therefore, the Examiner's combination of *Conrad, Reichman,* and *Moberg* has failed to establish a prima facie case, and the Appellant respectfully asks this Board to overturn the Examiner's rejection of claims 16–19.

VIII.   CLAIMS

A copy of the claims involved in the present appeal is attached hereto as Appendix A. As indicated above, the claims in Appendix A do include the amendments filed by Applicant on April 26, 2005, and do not include the amendment(s) filed on October 11, 2005.

IX.   EVIDENCE

No evidence pursuant to §§ 1.130, 1.131, or 1.132, or entered by or relied upon by the Examiner, is being submitted.

X.   RELATED PROCEEDINGS

No related proceedings as indicated in II. above.

I hereby certify that this correspondence is being deposited with the U.S. Postal Service as Express Mail, Airbill No. EV568265937US, in an envelope addressed to: MS Appeal Brief – Patents, Commissioner for Patents, PO Box 1450, Alexandria, VA 22313-1450, on the date shown below.

Date of Deposit: 02-23-2006

Typed Name: Susan Bloomfield

Signature: _____

Respectfully submitted,

By_____
      Michael A. Papalas
      Attorney/Agent for Applicant(s)
      Reg. No.: 40,381

Date: 02-23-2006

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APPENDIX A

Claims Involved in the Appeal of Application Serial No. 10/007,116

1.   (Canceled)

2.   (Previously Presented) The system of claim 22 wherein said data collection logic is further configured to collect performance information from said networked device indicative of at least one performance criteria, wherein said performance information is included in said collected information.

3.   (Original) The system of claim 2 wherein said message generation logic is responsive to an elapsed time.

4.   (Original) The system of claim 2 wherein said message generation is responsive to a message received from said remote server.

5.   (Previously Presented) The system of claim 22 wherein said digital network comprises the Internet.

6.   (Previously Presented) The system of claim 22 wherein said collected information contains error information.

7.   (Previously Presented) The system of claim 22 further comprising:
a non-human networked device manager at least partially defined by software components, said networked device manager responsive to a second message which directs said networked device manager to perform a specific action.

8.   (Previously Presented) The system of claim 22 wherein said networked device is a jukebox.

9.   (Original) The system of claim 7 wherein said second message instructs said networked device manager to cause said networked device to use redundant hardware.

10.   (Original) The system of claim 7 wherein said second message instructs said networked device manager to cause a reconfiguration of said networked device.

11.   (Original) The system of claim 7 wherein said second message instructs said networked device manager to replace a software module contained within said networked device with a replacement software module.

12.   (Previously Presented) A method of performance monitoring comprising the steps of:

collecting information from a networked device pertaining to an ability of said networked device to perform a function;

receiving a trigger event related to said device's ability to perform said function;

organizing at least a portion of said collected information into a message;

transmitting said message to a server in response to receiving said trigger event; and

automatically analyzing said message to determine an appropriate modification of said networked device.

13.   (Canceled)

14.   (Original) The method of claim 12 wherein said information contains error information.

15.   (Original) The method of claim 12 wherein said trigger event is an elapsed time.

16.   (Original) The method of claim 12 wherein said trigger event is the detection of an error condition.

17.   (Original) The method of claim 12 wherein said trigger event is the receipt of a message.

18.   (Original) The method of claim 12 further comprising the steps of:

receiving a second message from said server, wherein said second message directs said networked device to perform a specific action.

19.   (Original) The method of claim 18 wherein said second message causes a networked device manager to take an action.

20.   (Original) The method of claim 12 wherein said message is transmitted over a digital packet network.

21.   (Canceled)

22.   (Previously Presented) A data collection and transmittal system, the system comprising:

a networked device, connected to a digital network, performing a dedicated stand-alone function;

data collection logic configured to collect information pertaining to said networked device's ability to perform said standalone function;

message generation logic configured to recognize a trigger event, associated with networked device's ability to perform said standalone function, and configured to generate an electronic message containing at least a portion of said collected information; and

a remote server configured to receive said electronic message over said digital networked and to determine an action to be taken with respect to said networked device.

23.   (Previously Presented) A consumer appliance configured to perform a dedicated standalone function at a consumer location, said compliance comprising:

a network card, capable of communicating with a remote server over a network;

appliance performance logic, communicatively coupled to said network card, and capable of communicating a malfunction of said appliance to a remote server; and

appliance repair logic, communicatively coupled with said network card, and capable implementing a repair action in response to instructions received from said remote server.

24.   (Previously Presented) The consumer appliance of claim 23 wherein said repair logic is capable of installing one of firmware or software transmitted to said appliance from said remote server.

25.   (Previously Presented) The consumer appliance of claim 23 wherein said repair logic is capable of, pursuant to instruction received from said remote server, bypassing malfunctioning hardware of said appliance and enabling a connection of redundant hardware.

APPENDIX B

IX.   EVIDENCE

No evidence pursuant to §§ 1.130, 1.131, or 1.132, or entered by or relied upon by the Examiner, is being submitted.

APPENDIX C

XI.   RELATED PROCEEDINGS

No related proceedings as indicated in II. above.